Supreme Court, U.S.
FILED

08-431 SEP 30 2008

OFFICE OF THE CLERK

No. ———

In The
Supreme Court of the United States

ART ROBERTS,

Petitioner,

v.

CENTER FOR BIOETHICAL REFORM, INC., et al.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

GIBEAUT, MAHAN & BRISCOE
GARY ROBERT GIBEAUT, ESQ.
NANCY MAHAN-LAMB, ESQ.
JOHN W. ALLEN, ESQ.
Counsel of Record
JULIE A. MULLANE, ESQ.
6701 CENTER DRIVE WEST
SUITE 611
LOS ANGELES, CA 90045
Tel: (310) 410-2020
Fax: (310) 410-2010

LOS ANGELES UNIFIED SCHOOL DISTRICT
OFFICE OF THE GENERAL COUNSEL
GREGORY MCNAIR, ESQ.
KATRINA CAMPBELL, ESQ.
333 SOUTH BEAUDRY AVENUE
20TH FLOOR
LOS ANGELES, CA 90017
TEL: (213) 241-7600
FAX: (213) 241-3313

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether graphic, blown-up photographs of aborted fetuses constitute a manner of expression which can reasonably be regulated by a time, place and manner of restriction on speech adjacent to a public middle school.

2. Whether a captive audience of public school children can constitutionally exercise a "heckler's veto" over disturbing speech which interferes with the good order of that public school.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. Factual Background 4

B. Procedural History 7

REASONS FOR GRANTING THE WRIT 13

I. GRAPHIC, DISTURBING PHOTOGRAPHS – OF ANY SUBJECT – CAN BE A MANNER OF EXPRESSION MORE DISRUPTIVE TO CHILDREN AND THE OPERATION OF A SCHOOL THAN LOUD DEMONSTRATIONS AND, THEREFORE, CAN BE SUBJECT TO REASONABLE TIME, PLACE AND MANNER RESTRICTIONS 14

II. IN THE ALTERNATIVE, PETITIONER REQUESTS THAT THE COURT FASHION AN EXCEPTION TO THE "HECKLER'S VETO" LINE OF CASES ALLOWING FOR THE CONSTITUTIONAL EXERCISE OF SUCH A VETO BY A CAPTIVE AUDIENCE OF MINOR PUBLIC SCHOOL CHILDREN. 21

CONCLUSION 25

APPENDIX

Appendix A: Ninth Circuit Opinion (July 2, 2008) 1a

Appendix B: District Court Order on Cross-Motions for Summary Judgment (January 24, 2005) 39a

Appendix C: District Court Complaint (April 17, 2003) 55a

TABLE OF AUTHORITIES

Cases

Bachellar v. Maryland,
397 U.S. 564 (1970) 23

Brown v. Louisiana,
383 U.S. 131 (1966) 23

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 15

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 18

Forsyth County, Georgia v. Nationalist Movement,
505 U.S. 123 (1992) 12, 23

Frye v. Kansas City Missouri Police Dept.,
375 F.3d 785 (8th Cir. 2004) 20

Grayned v. City of Rockford,
408 U.S. 104 (1972) ..... *passim*

Hill v. Colorado,
530 U.S. 703 (2000) 17, 23, 24

Olmer v. City of Lincoln,
192 F.3d 1176 (8th Cir. 1999) 24

Olmstead v. United States,
277 U.S. 438 (1928) 23

Ovadal v. City of Madison, Wisconsin,
469 F.3d 625 (7th Cir. 2006) 18

Perry Education Assn. v. Perry Local Educators Assn.,
460 U.S. 37 (1983) 24

Rowan v. United States Post Office Dept.,
397 U.S. 728 (1970) 24

Tinker v. Des Moines Sch. Dist.,
393 U.S. 503 (1969) 10, 12

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 10

Constitutional Provisions

Cal. Const. art. I, §28(c) 25

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 3

Statutes

28 *U.S.C.* Section 1254(1) 2

42 *U.S.C.* Section 1983 ..... 3, 7

California *Education Code* Section 32210 9

California *Education Code* Section 44807 15

California *Education Code* Section 44811 ..... 8, 9

California *Education Code* Sections
48260-48273 22

California *Penal Code* Section
626.8 ..... *passim*

California *Penal Code* Section 626.8(c)(2) 8

INTRODUCTION

In a decision which threatens to open a Pandora's Box of difficulties for public school districts throughout the Ninth Circuit – and throughout the nation – the Ninth Circuit has ruled that conduct adjacent to a public middle school which is known to cause middle school age students to "faint," "become physically ill," and "weep," cannot be regulated by a content-neutral, reasonable time, place, and manner regulation on speech. Rather, in a departure from this Court's prior rulings on reasonable limitations on speech which occur adjacent to public schools, the Ninth Circuit has held that, a speaker showing graphic and disturbing, blown up photographs of aborted fetuses mounted on a truck circling a middle school, causing disruption at the school, is not subject to a time, place and manner restriction on speech. According to this new decision, if the message contained in the photographs is silent, it is not subject to a "manner" restriction on speech.

In ruling that Respondents have a First Amendment right to circle a middle school with their truck, apparently without regard to any level of disruption or disturbance caused thereby, the Ninth Circuit has departed from this Court's well-reasoned jurisprudence that reasonable time, place and manner restrictions on speech, particularly around in-session public schools, are necessary and appropriate to maintain the good order of the nation's schools.

In an era when school district budgets are increasingly strained by various mandates, providing fewer resources for supervisory staff, administrators will, if the Ninth Circuit's decision stands, be deprived

of one effective element within their arsenal of tools used to maintain order on public school sites.

This Court has not provided guidance to public schools on the balance between the First Amendment rights of the general public to free speech on traditional public fora – streets and sidewalks adjacent to public school buildings – and the rights of students and school administrators to be free from unreasonable disturbances of the school's good order, since Grayned v. City of Rockford, 408 U.S. 104 (1972). Given the Ninth Circuit's radical departure from the holding of Grayned, this Court's authoritative guidance is desperately needed.

OPINIONS BELOW

The Order Granting Summary Judgment by the United States District Court for the Central District of California (per Taylor J.) is reprinted App. 39a-54a and is not otherwise published. The Ninth Circuit's decision (per Pregerson, J., joined by Fletcher and, J. Berzon J.) reversing the District Court is reprinted at App. 1a-38a and is published at 533 F.3d. 780.

JURISDICTION

The Ninth Circuit rendered its decision on July 2, 2008. Petitioner invokes this Court's jurisdiction under 28 *U.S.C.*§1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the *United States Constitution* provides, in pertinent part:

> Congress shall make no law...abridging the freedom of speech...

The Fourteenth Amendment to the *United States Constitution* provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, Section 1983 of the *United States Code* provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

California *Penal Code*, Section 626.8, provides, in pertinent part, the following:

(a) any person who comes into any school building or upon any school ground, or street, sidewalk or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities, is guilty of a misdemeanor if he or she does any of the following:

(1) remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by a...sheriff or deputy sheriff...

(2) re-enters or comes upon that place within 7 days of being asked to leave by a person specified in Paragraph (1).

(3) as otherwise established a continued pattern of unauthorized entry.

This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, ART ROBERTS, ("Roberts") was the Assistant Principal at Dodson Middle School, a part of the Los Angeles Unified School District, located in

Rancho Palos Verdes, California, on the morning of March 24, 2003. (App. 6a.) Middle schools in the Los Angeles Unified School District comprise Grades 6, 7 and 8, and typically have students ranging in age from 11 to 14. (App. 44a.) On March 24, 2003, classes at Dodson Middle School started at 8:01 a.m., although students typically began arriving at the site as early as 7:15 a.m. Roberts was one of the Dodson Middle School staff on duty that morning to supervise children as they entered the school campus. (App. 6a.)

Respondent, CENTER FOR BIOETHICAL REFORM, is a nonprofit organization whose main purpose is to promote prenatal justice and the right to life for the unborn...". One of its educational programs is called the "reproductive choice campaign". As part of that campaign, the Center for Bioethical Reform drives trucks on surface streets and freeways with large, graphic photographs of first-term aborted fetuses on its sides. (App. 42-52.) On the morning of March 24, 2003, the Center for Bioethical Reform drove a truck, with photographs of large aborted fetuses on its side around the Dodson Middle School. Specifically, the truck began circling Dodson Middle School at approximately 7:30 a.m. and drove on public streets around the perimeter of the school. (App. 6a.)

The enlarged, graphic photographs of aborted fetuses are so disturbing that, the Center for Bioethical Reform's Executive Director testified at deposition that he has seen students "faint", "become physically ill", "weep", "avert their gaze" and "leave the room" in response to the pictures. (App. 5a. Photographs of the trucks were attached as Exhibits to the Complaint and are reproduced at App. 73a-75a.)

On the morning of March 24, 2003, the Dodson Middle School student reaction was along the lines of the conduct described by the Executive Director. Petitioner Roberts observed some students stopping on the sidewalks to stare at the photographs, while others stopped in the middle of the street. Faculty members reported abnormal difficulty getting children onto the campus. In addition, Petitioner Roberts saw some children express anger over the display. He overheard a group of boys planning to throw rocks at the truck. The group disbanded only after Roberts confronted them. Roberts also observed two or three girls crying and was told that at least one class spent classroom time discussing the truck's displayed images of aborted fetuses. (App. 6a-7a.)

The vast majority of Dodson Middle School students arrive between 7:15 a.m. and 8:00 a.m., causing heavy traffic. The heavy traffic can create safety concerns and Roberts testified that there had been previous accidents involving automobiles and children pedestrians on the streets around the Dodson School. (App. 6a) It should also be noted that, on the morning of the incident, some students momentarily "stood in the middle of the street". (App. 6a.)

Dodson Middle School officials contacted the Sheriff's Department at 7:50 a.m. to report the disruption caused by the Center's truck circling the school. At 8:05 a.m., the Sheriff's Department responded to Dodson Middle School. Sheriff's officers pulled over the truck with the photographs of the aborted fetuses, as well as the Center's "security vehicle", a white Ford Crown Victoria, equipped with a security cage, red and amber flashing lights, push

bars and an antenna mounted on the roof. (App. 7a.) Eventually, Petitioner Roberts accompanied a Sheriff's Deputy to the two vehicles where he read California *Penal Code* Section 626.8 to the Center's two employees. The Center's employees left the area at 9:20 a.m. and allege that, because of fear of arrest, they have not taken their reproductive choice campaign to any other school in Los Angeles County since March 24, 2003. (App. 8a.)

B. Procedural History

Respondents filed their Complaint in the United States District Court for the Central District of California on April 17, 2003. (App. 55a-75a.) As to Petitioner Roberts, the only defendant employed by Los Angeles Unified School District, the Complaint alleged violations of 42 *U.S.C.* Section 1983 for violation of Plaintiff's First Amendment rights to freedom of speech and Conspiracy to violate Plaintiff's First Amendment right to freedom of speech. The Complaint named Roberts in both his official and individual capacity. (App. 55a.)

The Complaint also named various individual Los Angeles County Sheriff's Department officers and the Los Angeles County Sheriff's Department.

In response to a Motion to Dismiss, the District Court, on October 22, 2003, determined that each of the individual defendants, including Petitioner Roberts, were entitled to qualified immunity and, therefore, dismissed Roberts in his individual capacity. (App. 40a.) The Ninth Circuit affirmed the District

Court's dismissal of the individual defendants in their official capacity. (App. 41a.)

On January 24, 2005, the District Court ruled on the parties' cross motions for summary judgment on all claims. (App. 39a-54a.) As to Petitioner Roberts, the Court discussed the claims for relief pertaining to the First Amendment as against him. (Petitioner Roberts was not named in the Complaint regarding an alleged violation of Fourth Amendment rights against search and seizure.) The District Court analyzed the application of California *Penal Code* Section 626.8 to Petitioner's conduct, by breaking the statute down into three prongs: 1) "lawful business"; 2) disruption; and 3) constitutionally protected speech. (App.42a-47a.)

As to the lawful business prong, the District Court held that Section 626.8's application to persons adjacent to school property, "without lawful business thereon" required that Respondent's presence adjacent to the school must be prohibited by statute, ordinance or any regulation adopted pursuant to statute, or ordinance pursuant to Section 626.8(c)(2). (App. 42a.)

The District Court quoted California *Education Code* Section 44811, which prohibits conduct in a place where a school employee is required to be in the course of his or her duties, which materially disrupts class work or extracurricular activities or otherwise involves substantial disorder. The District Court found that the undisputed facts demonstrated at least one class had to devote class time to discussing plaintiff's conduct and, therefore, there was a material disruption of the class work. (App. 42a.)

The District Court also found substantial disorder at the school under *Education Code* Section 44811, in that two or three girls began crying after seeing the truck; 10 to 12 boys began planning to throw rocks at the truck; school administrators had difficulty getting the students from the area outside the school buildings into the classrooms, pursuant to school policy; and at least one class deviated from its regular curriculum to discuss plaintiff's conduct. (App.43a.)

The District Court also found a violation of California *Education Code* Section 32210, which makes it a misdemeanor to willfully disturb any public school. The District Court found Respondent's disturbance was willful, in that they chose to drive around a middle school between 7:30 a.m. and 8:00 a.m., while students typically arrive for school. The District Court further noted that Respondents chose a middle school where most children range in age between 11 and 13, because one of the respondents had previously observed children become upset by the images on the truck. Specifically, children have reacted by expressing disbelief, crying, fainting, experiencing physical illness, making obscene gestures and throwing things at the truck. The District Court concluded that Respondent's actions violated *Education Code* Section 32210. (App. 43a-44a.)

As to the second prong of the District Court's analysis, "Disruption", the Court referenced its discussion regarding Prong 1, "Lawful Business", and determined that there had been an interference with the peaceful conduct of the activities of the school and disruption of the school or its pupils or school

activities, pursuant to *Penal Code* Section 626.8. (App. 44a.)

The District Court next turned to its third prong of its analysis of Section 626.8, "Constitutionally Protected Speech", noting that *Penal Code* Section 626.8 provides that it is not to be used, "to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly". (App. 44a.)

The District Court began its analysis by quoting from Grayned v. City of Rockford, 408 U.S. 104, 118 (1972), quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969). The District Court noted that, under that authority, expressive activity by members of the public may be prohibited on public sidewalks adjacent to school grounds if the activity "materially disrupts class work or involves substantial disorder or invasion of the rights of others." The District Court found that the activity was a substantial disruption of class work and created substantial disorder at the school. The District Court further found that the restriction on plaintiff's speech was a reasonable, content-neutral time, place and manner restriction that served a significant government interest, was narrowly tailored to advance that interest, and left open ample alternative channels of communication, pursuant to Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). (App. 45a.)

The District Court next determined that the undisputed facts established that the restriction on respondent's speech was not based on the content of their message. The District Court concluded that the facts established that the "graphic pictures" were

disruptive to the students, not the message which respondents were attempting to convey with the pictures. (App. 45a-46a.) The District Court further found the statute furthered a significant government interest in having undisrupted school sessions conducive to students' learning pursuant to Grayned, 408 U.S. at 119. The District Court found the application of the statute was narrowly tailored to advance this interest in that plaintiffs were ordered to leave only the public streets adjacent to the school area and were not prohibited from driving their truck on other public streets. (App. 46a.) The District Court found ample alternative channels of communication were left open to respondents and they were not prohibited from conveying their message in a non-disruptive manner or from going to any other place other than the streets adjacent to the school. (App. 46a-47a.)

The Court granted summary judgment in favor of petitioner, Art Roberts. (App. 53a.)

On appeal, the Ninth Circuit reversed the District Court's granting of summary judgment to Petitioner Art Roberts and reversed the District Court's denial of summary judgment to Respondent on the First Amendment claims. The Ninth Circuit held that *Penal Code* Section 626.8, as applied to respondent's conduct herein, was not a reasonable time, place and manner restriction on speech, in that the application to respondent's conduct would not be "content neutral". The Ninth Circuit interpreted the application of Section 626.8 herein as applied based upon the reaction of the audience – in this case, the students at Dodson Middle School – thereby making it a content-

restrictive regulation or "heckler's veto". The Ninth Circuit, quoting Tinker v. Des Moines, found that the respondent's activity at issue, speech which varies from the majority's opinion, may inspire fear or start an argument or cause a disturbance, but, pursuant to Tinker, the Constitution says we must take this risk. Tinker, 393 U.S. at 508. (App. 13a.)

The Ninth Circuit then analyzed the heckler's veto line of cases, with an emphasis on this court's holding in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123 (1992). Under Forsyth County, and earlier cases of this court regarding heckler's vetoes, the Ninth Circuit ruled that if a listener reacts to speech based on its content and the government ratifies that disruptive reaction by restricting the speech, the restriction is based upon the content of the speech. Therefore, the statute or regulation cannot be a reasonable time, place and manner restriction for failure to establish content neutrality. (App. 14a-16a.)

The Ninth Circuit noted that unlike previous cases addressing the heckler's veto, the current case involved the presence of children. Nevertheless, the court declined to create a "minor's exception" to the prohibition on ratifying a heckler's veto. (App. 17a-18a.)

The Ninth Circuit next analyzed California *Penal Code* Section 626.8, finding that California courts would construe the statute narrowly, so as to avoid First Amendment problems. Specifically, the Ninth Circuit held that Section 626.8 was intended to apply to manner rather than content of speech and, therefore, would not apply to the respondent's conduct

in driving their trucks around Dodson Middle School. (App. 21a-24a.)

Finally, the court upheld the trial court's granting of qualified immunity to Petitioner Roberts. (App. 27a.)

The Ninth Circuit remanded to the District Court for determination of Plaintiff's request for injunctive relief and Respondent's claim for relief based upon conspiracy to violate Respondent's First Amendment rights. (App. 38a.)

REASONS FOR GRANTING THE WRIT

The Petition should be granted to allow this Court to set forth guidance to school administrators across the nation regarding the application of reasonable time, place and manner restrictions on speech adjacent to a public school which, whether through loud noises or disturbing images, disrupt the functioning of the school.

The Ninth Circuit's opinion, if upheld, will wreak havoc in the administration of public schools. Administrators will no longer feel confident in invoking statutes such as *Penal Code* Section 626.8 as a reasonable time, place and manner restriction on speech occurring adjacent to their schools which is disrupting some aspect of the school's functioning. Indeed, administrators will now be on notice that, any attempt to invoke a reasonable time, place and manner restriction on disruptive speech adjacent to their schools may result in personal liability pursuant to the Ninth Circuit precedent.

The case provides the Court with the opportunity to clarify the law regarding the right of the public to speak and demonstrate adjacent to public school and the scope of reasonable time, place, and manner restrictions on that right to maintain the good order of the nation's public schools.

I. GRAPHIC, DISTURBING PHOTOGRAPHS – OF ANY SUBJECT – CAN BE A MANNER OF EXPRESSION MORE DISRUPTIVE TO CHILDREN AND THE OPERATION OF A SCHOOL THAN LOUD DEMONSTRATIONS AND, THEREFORE, CAN BE SUBJECT TO REASONABLE TIME, PLACE AND MANNER RESTRICTIONS.

The Ninth Circuit declined to reach the constitutionality of California *Penal Code* Section 626.8, holding that California courts would interpret the statute narrowly, so as not to apply to the conduct at issue herein. Petitioner submits that the Ninth Circuit erred in holding that California courts would interpret the statute narrowly, so as not to apply to Respondents' conduct and, further, that interpreting the statute so as to apply to the conduct of Respondent not only comports with the statute's clear language but, further, such an application of the statute to the conduct herein would not violate Respondent's First Amendment rights.

California *Penal Code* Section 626.8, as applied herein, is a reasonable time, place and manner restriction on free speech which meets with this Court's previous decisions regarding time, place and manner regulations.

This Court, in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) stated that restrictions on time, place or manner of protected speech are reasonable when they,

> are justified without reference to the content of the regulated speech, [...] are narrowly tailored to serve a significant governmental interest, and [...] leave open ample alternative channels for communication of the information.

Clark, 468 U.S. at 293.

Starting with Prong 3, the statute at-issue herein clearly leaves open ample alternative channels or communication of the information. Respondents could drive their truck around the Dodson Middle School when school is not in session; they could drive their truck on streets near the school, so long as they are not immediately adjacent to the school; and, further, they could drive their truck past a middle school, once, without triggering *Penal Code* Section 626.8.

As to Prong 2, there is clearly a significant governmental interest in maintaining the good order of a public middle school. Under California *Education Code*, Section 44807, school district administrators and staff are responsible for providing reasonable supervision of students on school premises prior to the first class of the day.

In addition to concerns regarding maintenance of order and discipline on school campuses while students are arriving at school, educators have an interest in preventing automobile collisions with

student pedestrians attempting to enter or exit the campus. The spectacle created by Respondents' truck circling the school as children attempt to enter creates a clear danger of physical harm to the students.

Further, the statute is narrowly tailored to serve the purpose of protecting the good order of the public schools. It limits the conduct of the public only on school grounds or on sidewalks or streets immediately adjacent to the public school. Additionally, it provides for the school staff or police officer to give notice to the speaker that his speech or conduct is creating a disturbance at the school, and, pursuant to the statute, the person must leave or be held in violation of the statute.

The first prong of the reasonable time, place and manner restriction is where Petitioner submits the Ninth Circuit erred. The first prong requires that the restrictions are justified without reference to the content of the regulated speech. The Ninth Circuit held that, since the statute, as applied herein, required the students to become disturbed by the speech, the application of the statute was an improper heckler's veto requiring an analysis of the content of the speech before the statute could be invoked. Therefore, the Ninth Circuit held that the statute, as applied, failed the first prong of the reasonable time, place and manner restriction on speech in that it was not content-neutral. Petitioner Roberts and the Sheriff's Department acted only after the students at the school became upset and unruly, thereby making the application of the statute a heckler's veto based on the speech's content.

The Ninth Circuit erred in holding that giant photographs of aborted fetuses were not a manner of speech similar to driving around the school with a public address system, creating noise which disturbed the students' ability to learn. Grayned, 408 U.S. at 108-109.

As an initial matter, the Ninth Circuit erroneously held that there is a distinction -- in this case – between a loud, boisterous demonstration, or a vehicle circling a school with a loud public address system, constituting a manner of speech which can be reasonably regulated; and circling a school with large, blown-up photographs of aborted fetuses, constituting a message solely. Graphic photographs, enlarged and placed on the side of a truck, circling a middle school, can constitute a manner of speech which is as disruptive of the school order as the boisterous demonstration. The Ninth Circuit's opinion does not explain why an aural assault is a disruptive manner of speech, while a disruptive visual assault is not a manner of speech but, rather, a content-based distinction. As this Court stated in Hill v. Colorado, 530 U.S. 703 (2000),

> The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.

Hill, 530 U.S. at 716.

However, "'it may not be the content of the speech, as much as the deliberate, verbal or visual assault that

justifies proscription.'" *Ibid.*, quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-211 n.6 (1975).

Here, it was not the content of the respondent's speech – an anti-abortion message – but rather, the manner in which Respondents expressed their message.

Indeed, many other groups circling a middle school with large, blown-up photographs expressing their cause would likewise constitute a visual assault on children: People for the Ethical Treatment of Animals, Amnesty International, Anti-war groups, etc. It would not be the content of the message desired to be conveyed but, rather, the manner – large, disturbing photographs– which would constitute the provocation of disruptive behavior by the students. As noted by the 7th Circuit in Ovadal v. City of Madison, Wisconsin, 469 F.3d 625, 627 (7th Cir. 2006), the mere spectacle of protestors on an overpass over a high-speed traffic freeway may cause a disruption which may be restricted. However, if the message conveyed causes the disruption, the speech cannot be restricted.

The Ninth Circuit's opinion, below, quoted from the deposition of Gregg Cunningham from Respondents' organization, wherein he stated that the reaction of children to the photographs includes fainting, becoming physically ill and crying. (App. 5a.) Such physical reactions transcend the mere content of Respondents' message; the manner of Respondents' conveyance of that message - enlarged photographs of such a disturbing nature that middle school-aged students have reacted not dissimilarly to exposure to

tear gas – is the conduct which the State has an interest in regulating.

The Ninth Circuit's error in its analysis of time, place and manner restrictions is particularly apparent at fn 3, wherein the decision quotes from this court's decision in Grayned. In Grayned, 408 U.S. at 108-09, the Court ruled that a loud, boisterous demonstration, adjacent to school property and during school hours, could be prohibited under a statute similar to California *Penal Code* Section 626.8 because the loud conduct interfered with the ability of the students to concentrate and, therefore, frustrated the essential purpose of a school (i.e., student learning.) The Ninth Circuit noted that the Grayned Court commented that, had the demonstration occurred before or after school, as students were entering or leaving the school, the statute could not be invoked. The Ninth Circuit then concluded that, because the behavior herein occurred while students were entering the school, the case did not fall within the ambit of the court's holding in Grayned. (App. 11a-12a.)

The Ninth Circuit failed to consider the distinction in the manner of speech in Grayned and herein. In Grayned, the Court held that loud, boisterous demonstrations (an aural assault) could disturb the concentration of students while they are in the classroom. The Grayned Court commented, in dicta, that a loud, boisterous demonstration, while students are not attempting to learn (e.g., while entering or leaving the school) would not invoke the statute. In Grayned, the Court reasonably concluded that loud noises typically do not interfere with students coming and going to school.

In the present case, however, the visual assault posed by Respondents' photographs occurred while the students were required to enter the school campus and proceed to their classrooms. This visual assault, known to cause fainting, physical illness and crying, occurred at a time when the students could not avoid seeing it and responding to it. Indeed, just as a noisy, boisterous demonstration may not interfere with students coming and going to school, a silent disturbing image circling the school, while it is in session, may likewise not interfere with the good order of the school. However, a silent, disturbing image – a visual assault – circling the school while students are entering the campus can be (and was) a manner of speech which disturbed the school's proper functioning.

The fact that school started at 8:01 a.m., on schedule, with students in their classrooms, is immaterial. A school administrator needs to know, particularly with children of middle school age, when to take action to prevent misconduct from reaching a "tipping point" beyond which supervisors lose control of a situation. While the testimony is undisputed that there was a disruption of the normal school day caused by Respondents' activity, it is also undisputed that a riot did not break out. However, the authorities are entitled to determine that a situation presents a danger before an accident occurs. Frye v. Kansas City Missouri Police Dept., 375 F.3d 785, 791 (8th Cir. 2004).

As an aural assault during class time can disrupt the good order of the school, so can a visual assault as students are entering campus create a disruption. Indeed, while an aural assault may disrupt

concentration, as in Grayned, a visual assault, as herein, could cause fainting, physical illness and crying. The Ninth Circuit's opinion errs in holding that an aural disturbance is a manner of speech, but a visual disturbance is not.

As the spectacle herein (photographs of such a disturbing nature that they cause children involuntary, physical responses) and not the message (a description of the realities of abortion) caused the disturbance, it is the manner of Respondent's speech that is subject to the *Penal Code* Section. Therefore, the *Penal Code* Section, as applied herein, was a reasonable time, place and manner restriction and, therefore, there was no violation of Respondent's First Amendment rights to Freedom of Expression.

Petitioner requests that the Court grant this Petition to clarify the application of California *Penal Code* Section 626.8 and statutes throughout the country like it, to provide clear guidance to school district officials and law enforcement officials regarding the proper application of reasonable time, place and manner restrictions on speech at or adjacent to public schools when the manner of that speech disrupts the good order of the public school.

II. IN THE ALTERNATIVE, PETITIONER REQUESTS THAT THE COURT FASHION AN EXCEPTION TO THE "HECKLER'S VETO" LINE OF CASES ALLOWING FOR THE CONSTITUTIONAL EXERCISE OF SUCH A

VETO BY A CAPTIVE AUDIENCE OF MINOR PUBLIC SCHOOL CHILDREN.

Like all States, California has a mandatory education law, as well as truancy laws providing for the imposition of discipline for students who fail to attend or leave school while it is in session (California *Education Code* Sections 48260-48273.) As such, students congregating on the middle school campus prior to the first class are subject to the supervision of the District and, further, required to remain on campus pending the commencement of the first class of the day.

Therefore, public school children are a captive audience during and immediately prior to school hours. In the present case, the students at Dodson Middle School were a captive audience during the immediate pre-school hours when they were required to enter the campus and proceed to their first class of the day. Again, middle school students, in California, range in age from 11 to 14.

If the Court is not inclined to hold that *Penal Code* Section 626.8 is a reasonable time, place and manner restriction on speech, as applied below, then Petitioner submits that this Court should create an exception on the ban on heckler's vetoes by holding that the State has a compelling interest justifying a content-based restriction on speech, upsetting to a captive audience of minor school children.

The heckler's veto line of cases traditionally has held that a heckler, attempting to interrupt speech, is reacting to the content of the speech and, therefore,

any State action silencing a speaker in response to the heckler is a content-based restriction on speech, subject to strict scrutiny on review. Petitioner submits that a content-based restriction herein can pass strict scrutiny by this Court.

As the Ninth Circuit's opinion noted, the term heckler's veto first appeared in a footnote in Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966). The Ninth Circuit, quoted Bachellar v. Maryland, 397 U.S. 564, 567 (1970), to the effect that the Constitution prohibits restrictions on public expression, "merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations."

The Ninth Circuit likewise quoted Forsyth County, holding that the perspective negative reaction of an audience of bystanders to a parade of white supremacists could not justify charge the white supremacists organization for the cost of providing it with police protection.

However, none of the cases cited by the Ninth Circuit, nor in petitioner's research, has the Court addressed a heckler's veto when that veto is exercised by a captive audience of public school children. However, this Court has recognized the limited right of those uninterested in speech to avoid unwanted communication. Hill v. Colorado, recognized the unwilling listener's interest in avoiding unwanted communication and the broader "right to be let alone." Hill, 530 U.S. at 716-717, quoting Olmstead v. United States, 277 U.S. 438, 478, (1928) (Brandeis, J., dissenting.) The Court in Hill recognized the right to

avoid unwelcome speech has special force in the privacy of the home. Hill, 530 U.S. at 717, quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970).

Likewise, a captive audience of children, unwilling to be confronted by Respondent's visual assault, have a limited right to avoid the unwelcome speech while on public school grounds immediately prior to or during school hours. In addition, and perhaps more importantly, the adult administrators of the public school, statutorily charged with the duty to supervise these children and maintain order at the school, should have the right to exercise a heckler's veto on behalf of the minor children when necessary to maintain the good order of the school.

To survive a content-based restriction on speech in a public forum, the State must show that the, "regulation is necessary to serve a compelling State interest and that it is narrowly drawn to achieve that end." Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37 at 45 (1983). Petitioner submits that there is a compelling need to protect a captive audience of school children from frightening images which will cause a disruption in the good order of their public school.

As the 8th Circuit held in Olmer v. City of Lincoln, 192 F.3d 1176 (8th Cir. 1999), agreeing with the District Court therein, the State has a significant, compelling and legitimate constitutionally important interest in protecting very young children from frightening images. Olmer, *Ibid.* at 1180.

Like other States, California not only has statutory protections for the safety and welfare of children while attending public school, but also a State Constitutional right to such safe schools (Cal. Const. Art. I, §28(c).)

As is noted by Judge Pregerson in the Ninth Circuit's opinion, there is no precedent for an exception to the heckler's veto for a captive audience of minors. Petitioner submits that such an exception should be made and, further, that a compelling State interest – the protection of the safety and well-being of minors – warrants the creation of such an exception to the heckler's veto line of cases.

CONCLUSION

For the reasons set forth herein, Petitioner requests that the Court grant this Petition for Writ of Certiorari and reverse the Ninth Circuit's holding herein.

DATED: September 30, 2008

GIBEAUT, MAHAN & BRISCOE

By: GARY ROBERT GIBEAUT
NANCY MAHAN-LAMB
JOHN W. ALLEN
Counsel of Record
JULIE A. MULLANE

Attorneys for Petitioner,
ART ROBERTS